

Cooper



INSTRUCTION CPL 2-2.38

DATE: January 31, 1989
SUBJECT: Authorization and Procedures for Reviewing
Specific Medical Records to Verify Compliance
with TDL Rule Chapter 0800-1-3

TO: TOSHA Personnel

FROM: Director *RBV*
Chief, Standards & Procedures *RBC*

A. PURPOSE: This instruction authorizes appropriately qualified TOSHA personnel to conduct reviews of the medical records specified in paragraph G. of this instruction where there is a need to gain access to verify compliance with Tennessee Department of Labor Rule Chapter 0800-1-3 recordkeeping requirements.

B. DOCUMENTS REFERENCED:

1. TOSHA Field Operations Manual (FOM).
2. TOSHA Instruction CPL 2.22; dated March 1, 1982; Subject: Access to Employee Medical Records.
3. TOSHA Instruction CPL 2-2.29; dated May 13, 1982; Subject: Authorization of Review of Medical Opinions.
4. TOSHA Instruction CPL 2-2.30; dated May 13, 1982; Subject: Authorization of Review of Specific Medical Information.
5. TOSHA Instruction CPL 2-2.31; dated May 14, 1982; Subject: Procedures governing Enforcement Activities Involving Access to Employee Medical Records.
6. This instruction adopts the provisions of OSHA Instruction CPL 2-2.46; dated January 5, 1989; Subject: 29 CFR 1913.10(b)(6), Authorization and Procedures for Reviewing Specific Medical Records to Verify Compliance with 29 CFR 1904.
7. Tennessee Department of Labor Rules, Chapter 0800-1-3, OCCUPATIONAL SAFETY AND HEALTH RECORD-KEEPING AND REPORTING.

C. STANDARD REFERENCED: 29 CFR 1910.20, Access to Employee Exposure and Medical Records as adopted by amendment of TDL Rule 0800-1-1-.20 effective February 28, 1989. (See 53 FR 38163 - 38168, Federal Register/Vol. 53, No. 189/Thursday, September 29, 1988/Rules and Regulations.)

D. BACKGROUND:

1. Through the FOM, OSHA and TOSHA emphasized the necessity of examining all applicable employer injury and illness records during every inspection to verify compliance with the recordkeeping requirements of TDL Rule Chapter 0800-1-3. These records, which are often in the form of employee medical records, must be compared with the OSHA-200 log entries to investigate potential underreporting.

2. "Employee medical record" is defined at 29 CFR 1910.20(c)(6)(i) as a record concerning the health status of an employee which is made or maintained by a physician, nurse, or other health care personnel or technician, including:
 - a. Medical and employment questionnaires or histories (including job description and occupational exposures),
 - b. The results of medical examinations (pre-employment, pre-assignment, periodic, or episodic and laboratory tests (including chest or other x-ray examinations taken for the purposes of establishing a base-line or detecting occupational illness, and all biological monitoring not defined as an "employee exposure record"),
 - c. Medical opinions, diagnoses, progress notes, and recommendations,
 - d. First aid records,
 - e. Descriptions of treatments and prescriptions, and
 - f. Employee medical complaints.
3. TOSHA Instruction CPL 2.22, dated March 1, 1982, specifies the procedures governing TOSHA access to personally identifiable employee medical information contained in medical records. TOSHA excluded from coverage by that instruction, however, certain records that are of such occupational safety and health importance and that are so frequently used by various agency personnel that rigid approval and security would be both impractical and inappropriate.
4. Paragraph F.3. of TOSHA Instruction CPL 2.22 states that ".....This instruction does not apply to records required by TDL Rules in Chapter 0800-1-3," This is interpreted to mean that TOSHA does not need an access order or written employee consent to obtain access to the following employer-maintained records:
 - a. OSHA-200
 - b. OSHA-101 or equivalent.
 - c. Any backup information (e.g., first-aid logs, first report of injury, Workers' Compensation Form 6A) no more detailed than the type of information contained in the OSHA-101.
5. Certain backup medical records that may be necessary to verify compliance with TDL Rules in Chapter 0800-1-3 contain information more detailed than that required by the OSHA-101, such as written medical opinions, progress notes, prescriptions, and recommendation.

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6. Paragraph F.6. of TOSHA Instruction CPL 2.22 excludes from the procedures governing TOSHA records access situations "where a written directive by the Director, Division of Occupational Safety and Health, authorizes appropriately qualified personnel to conduct limited reviews of specific medical information mandated by an occupational safety and health standard, or of specific biological monitoring test results." Therefore, this instruction, pursuant to that provision, establishes procedures allowing direct TOSHA access to additional types of medical records when necessary for the sole purpose of verifying compliance with TDL Rules in Chapter 0800-1-3.
- E. STATUTORY PURPOSE AND NEED TO GAIN ACCESS: The purpose of obtaining access to the medical information specified in paragraph G.2. of this instruction is to ensure safe and healthful working conditions for working men and women by providing an effective enforcement program for TOSHA standards and the Tennessee Occupational Safety and Health Act of 1972 as amended (T.C.A. § 50-3-101 et seq.).
1. To accomplish this purpose, it may be necessary for TOSHA personnel to examine the employee medical information specified in paragraph G.2. of this instruction to determine compliance with the recordkeeping requirements of Chapter 0800-1-3.
 2. It may further be necessary for appropriately qualified TOSHA personnel to examine this medical information in a personally identifiable form to enable TOSHA to determine if all workplace injuries and/or illnesses involving more than first-aid treatment are properly recorded on the OSHA-200 form and the OSHA-101 form or equivalent.
 3. If a review of the medical information indicates that injuries and/or illnesses are occurring that are not being recorded, TOSHA will investigate closely to determine the propriety of the employer's decision not to record them. Personally identifiable information is, therefore, necessary to specify which records are to be examined and enable a complete investigation of all relevant information.
- F. QUALIFIED TOSHA PERSONNEL: Review of the medical information described in paragraph G.2. of this instruction shall be limited to :
1. Experienced safety and health compliance officers of grades OSS-2 or IH-2 or higher who are well versed in the OSHA/Bureau of Labor Statistics (BLS) recordability guidelines for the OSHA-200, or
 2. Professionals with specific training or experience in reviewing the types of medical information necessary to verify compliance with TDL Rule Chapter 0800-1-3 recordkeeping requirements, if approved in writing by the Director.
- G. AUTHORIZED MEDICAL INFORMATION:

1. This instruction hereby authorizes qualified TOSHA Personnel to examine the content of and, if appropriate, copy employee medical records that:
 - a. Are necessary to verify compliance with TDL Rule Chapter 0800-1-3 recordkeeping requirements, and
 - b. Contain more detailed information than that found in records specifically accessible to TOSHA pursuant to TDL Rule Chapter 0800-1-3 (e.g., the OSHA-101 or equivalent).
2. The types of medical information so authorized to be accessible, if not already accessible under paragraph D.4. of this instruction, are:
 - a. Daily reports of new injury or illness cases.
 - b. Workers' Compensation forms (independent of OSHA-200 and OSHA-101).
 - c. First-aid records.
 - d. Nurse/physician/clinic logs.
 - e. Company accident reports and/or insurers' accident reports.
 - f. Sanitized medical records available to employer officials outside the medical office.
3. This authorization is contingent upon adherence to the guidelines set forth in paragraph H. of this instruction.
4. The information revealed through review of the records authorized in this instruction can be used to document or support violations other than of TDL Rule Chapter 0800-1-3.
5. This instruction is not intended to limit TOSHA access to information authorized elsewhere by rule or directive.
 - a. Authorization procedures for access to biological monitoring results that involve the evaluation or physiological status of a body system are described in TOSHA Instruction CPL 2-2.30.
 - b. Authorization procedures for access to medical opinions mandated by existing standards are described in TOSHA Instruction CPL 2-2.29.
 - c. Biological monitoring results which directly assess the absorption of a substance or agent by body systems are exposure records - not medical records. (See 29 CFR 1910.20(c)(5)(ii) and TOSHA Instruction CPL 2-2.31, paragraph E.2.)

6. Access to information other than that specified in paragraphs G.2. and G.4. above, will require a written access order following the procedures in TOSHA Instructions CPL 2.22 and CPL 2-2.31 unless:
 - a. Specific written consent of an employee is obtained pursuant to 29 CFR 1910.20(e)(2)(ii)(B) and TOSHA or a TOSHA employee is listed on the authorization as the designated representative to receive the medical information.
 - b. A TOSHA contract physician consults with an employer's physician pursuant to TOSHA Instruction CPL 2.22.
 - c. TOSHA access to, or use of, personally identifiable employee medical information is obtained in the course of litigation.
- H. GUIDELINES FOR SCREENING AUTHORIZED MEDICAL INFORMATION: Access to the medical information described in paragraph G. of this instruction (hereinafter referred to as "authorized backup records") shall be restricted to situations where qualified TOSHA personnel have determined that a review of such records is necessary to verify compliance with TDL Rule Chapter 0800-1-3 recordkeeping requirements. Moreover, it shall be confined to only that extent needed to access Chapter 0800-1-3 compliance.
 1. Limit Removal of Records. Access to authorized backup records shall, if practicable, involve onsite review. If possible, remove direct personal identifiers from the medical information onsite and code the medical information and the list of direct identifiers with a unique identifying number for each employee. (See 29 CFR 1910.20(g) and TOSHA Instruction CPL 2-2.31.) A minimum of personally identifiable information shall be recorded for enforcement purposes and taken off-site.
 2. Limit Review of More Sensitive Records. Records reviewed to assess TDL Rule Chapter 0800-1-3 compliance shall be screened in reverse order of sensitivity (the least sensitive first) to determine needs for further review. The order of review will normally be:
 - a. OSHA-200 and/or OSHA-101 or equivalent.
 - b. Workers' Compensation forms independent of OSHA-200 and OSHA-101 or equivalent).
 - c. First-aid records, first report of injury (Workers' Compensation Form 6A), nurse/physician clinic logs, company accident reports, and insurers' accident reports, whose information is no more detailed than that of the OSHA-101 or equivalent.
 - d. Any further backup sanitized medical information describing injuries and illnesses resulting from workplace accidents/exposures available to employer officials outside the medical office.

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- e. Supporting records specified in paragraph H.2.c. that also contain more detailed medical information, such as medical opinions, progress notes, prescriptions, and recommendations.
3. Limit Access to Employee Medical File. Personally identifiable employee medical information shall be requested in as specific terms as possible to avoid unnecessary reviews of complete employee medical files.
4. Limit Unnecessary Documentation of Authorized Backup Records. Documentation of TDL Rule Chapter 0800-1-3 noncompliance through authorized backup records shall normally be confined to:
 - a. Employee name.
 - b. Nature of location of record.
 - c. Nature of observed recordkeeping deficiency.
 - d. Evidentiary relationship of record to observed recordkeeping deficiency.

NOTE: Personally identifiable information shall not be disclosed on the citation.

- I. SECURITY AND CONFIDENTIALITY: Where access to employee medical information is obtained pursuant to the authorization provided by this instruction, the Area Supervisor or a qualified person (see paragraph F. of this instruction) designated by the Area Supervisor shall be responsible for ensuring its security and confidentiality.
 1. TOSHA Use. Employee medical information in personally identifiable form obtained pursuant to this instruction shall be used and kept secured in accordance with TOSHA Instruction CPL 2.22, paragraphs L.2. through L.5., and TOSHA Instruction 2-2.31.
 2. Retention of Identifiers. If clearance is obtained from the TOSHA Medical Records Officer (Chief of Health Compliance), direct personal identifiers may be kept together with the authorized backup records to which access has been obtained pursuant to this instruction, as long as the instant investigation and/or subsequent litigation is ongoing. Upon completion of the instant investigation and/or subsequent litigation, the personal identifiers shall either be removed and retained separately, or all records shall be returned to their sources or destroyed consistent with TOSHA records disposition programs. (See TOSHA Instruction CPL 2.22, paragraphs K. and N. and Records Disposition Authorization (RDA) 819.
 3. Segregation. TOSHA files containing personally identifiable employee medical information obtained pursuant to this instruction shall be kept segregated from other files. When not in active use, files containing the information shall be kept secured in a locked cabinet.

Charge Out Cards shall be placed in the regular compliance case file to show the location of the segregated files.

4. Security. The security procedures set forth in paragraphs M.3. through M.5. of TOSHA Instruction CPL 2.22 shall be followed.
5. Interagency Transfer and Public Disclosure. Personally identifiable employee medical information obtained pursuant to this instruction shall not be transferred to another agency or office outside of the Division of Occupational Safety and Health, Department of Labor, State of Tennessee except to the following agencies and/or offices necessary to determine compliance with TDL Rule Chapter 0800-1-3 or disclosed to the public except when required by law or approved by the Commissioner of Labor:
 - a. General Counsel for the Department of Labor, State of Tennessee.
 - b. Attorney General and Reporter and/or Assistant Attorneys General for the State of Tennessee.
 - c. Occupational Safety and Health Administration, United States Department of Labor.
 - d. Bureau of Labor Statistics, United States Department of Labor
- J. TECHNICAL ASSISTANCE AND TRAINING: Technical assistance and/or training can be provided by the Office of Research and Statistics, Division of Labor Standards, and the TOSHA Medical Records Officer. It can also be provided, as necessary, the the Bureau of Labor Statistics and/or the OSHA Medical Records Officer, U.S. Department of Labor. Technical assistance and/or training shall be sought, where determined necessary, through the TOSHA Medical Records Officer and Assistant Director.
- K. WHEN ACCESS IS DENIED: If access to medical records, as authorized by this instruction is denied, an administrative subpoena shall be sought from the General Counsel and Commissioner of the Tennessee Department of Labor, if determined appropriate by the Enforcement Branch Chief and Director.
- L. ACTION: Enforcement Branch Chiefs and Area Supervisors shall ensure that the authorization described in paragraph G. of this instruction to review specific medical information is administered and implemented according to this instruction.
- M. EFFECTIVE DATE: This instruction is effective upon receipt and shall remain in effect until cancelled or superseded.